Supreme Court, U.S.
FILED
APR 8 1998
OFFICE OF THE CLERK

No. 97-1455

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BILL BRADFORD, *Petitioner*,

v.

STATE of CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF OF RESPONDENT IN OPPOSITION

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(CAPITAL CASE)

QUESTION PRESENTED

Whether, where law enforcement officers flagrantly disregard the scope of a search warrant and conduct a general, exploratory search, the appropriate remedy should only be the exclusion of all fruits of the search or exclusion of evidence that would not have been discovered and seized had the officers respected the limits of the warrant.

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OPINION BELOW

The petition seeks review of the California Supreme Court's published decision in *People v. Bradford*, 15 Cal. 4th 1229, 939 P.2d 259, 65 Cal. Rptr. 2d 145 (1997), affirming petitioner's conviction and judgment of death. A copy of the opinion is attached as Appendix A to the petition for a writ of certiorari.

STATEMENT OF JURISDICTION

The petition invokes the jurisdiction of this Court pursuant to 28 United States Code section 1257.

CONSTITUTIONS, STATUTES OR REGULATIONS

The petition relies upon the Fourth Amendment of the United States Constitution, the text of which is set forth on page 1 of the petition.

STATEMENT OF THE CASE

Petitioner was sentenced to death following a jury trial in which he was convicted of two counts of first degree murder. The jury also found true a special circumstance[1] finding of multiple murder. Cal. Penal Code §§ 190.2, subd. (a)(13). On automatic appeal (Cal. Penal Code § 1239), the California Supreme Court affirmed the judgment and penalty in its entirety. *People v. Bradford*, 15 Cal. 4th 1229, 939 P. 2d 259, 65 Cal. Rptr. 2d 145.

In the summer of 1984 petitioner murdered Shari Miller, age 21, and Tracey Campbell, age 15. The two young women had nothing in common except for an interest in modeling and an acquaintanceship with petitioner, who purported to be a photographer who could assist the young women in their careers.

Both women were murdered by way of ligature strangulation at a remote and isolated desert location. Shari was murdered at the desert location on July 4, 1984, after petitioner spent several hours photographing her at various rock formations. Fearing a mutual friend might visit the desert location over the July 4th holiday, petitioner tied Shari's body, placed her body into the trunk of his car, transported her body back to Los Angeles, and dumped her body in a parking lot on West Pico Boulevard, where it was discovered in the early morning hours of July 6, 1984.

On July 12, 1984, eight days after Shari's body was found, petitioner lured Tracey Campbell to the same desert location and murdered her by way of ligature strangulation. Petitioner gagged Tracey by wrapping

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1. A California petitioner is not death-eligible absent a finding by the jury or trial judge, where a jury is waived, of one of a number of enumerated "special circumstances" listed in California Penal Code section 190.2

around her head a blouse belonging to Shari. This time, however, petitioner left his victim's body at the desert location, where it decomposed and was partially eaten by coyotes. Thus, by the time Tracey's body was discovered on August 11, 1984, it was unidentifiable -- even the sex of the remains could not be determined. Dental records established the remains of the body to be Tracey Campbell.

Following petitioner's arrest on July 31, 1984, police found in petitioner's car photographs depicting Shari Miller at the identical desert location where the remains of Tracey's body were later found.

Following his arrest, and during proceedings in the trial court, petitioner filed a motion to suppress evidence pursuant to California Penal Code section 1538.5, a motion to quash and traverse the search warrant of July 31, 1984, and a motion to suppress evidence and quash and traverse the search warrant of August 16, 1984.[2/] The trial court denied petitioner's motion to suppress evidence. As to the July 31, 1984, search, the court ruled that the police officers had not conducted an exploratory search, but rather had seized items described in the warrant or closely resembling such items, or that were so connected with specifically described items that it would be impossible or impracticable to separate items prior to their seizure. The trial court also denied petitioner's motion to quash and traverse the search warrant issued on August 16, 1984.

At trial the prosecution established that the photographs found in petitioner's car on July 31, 1984, were taken on July 4, 1984. Other physical evidence, as well as several incriminating statements made by petitioner, were presented by the prosecution to establish petitioner's guilt of the murders. The prosecution's

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2. The details of these searches, including the lower court rulings, are set forth in Argument II, *post*.

evidence against petitioner at the guilt phase of the trial was uncontradicted as petitioner chose not to present a defense.

At the penalty phase the prosecution called seven witnesses who testified concerning a prior rape for which petitioner was charged and eventually convicted, as well as a number of prior uncharged violent criminal activities. After petitioner was granted permission to act as his own attorney, he rested without calling any witnesses to testify and without presenting any evidence in mitigation. Subsequent to the prosecutor's closing argument, petitioner made the following closing argument to the jury: "Think of how many you don't even know about. You're so right. That's it."

SUMMARY OF REASONS FOR DENYING PETITION

1. The petition should be dismissed because petitioner opposes the filing of the petition and has not authorized or otherwise approved it.

2. Discretionary review should not be exercised to address a hypothetical issue regarding the remedy for police misconduct that is not presented by the facts or circumstances of this case.

ARGUMENT

I.

THE PETITION SHOULD BE DISMISSED BECAUSE THE PETITIONER APPARENTLY OPPOSES ITS FILING

On October 14, 1997, an attorney named Jack Leavitt wrote to this Court on petitioner's behalf. Mr. Leavitt is a member of the bar of this Court. Mr. Leavitt wrote that he had been retained by petitioner *pro bono* and was writing to convey petitioner's request that this Court reject a petition for a writ of certiorari as unauthorized.

As Mr. Leavitt explained in his letter, on July 14, 1997 the California Supreme Court's affirmed petitioner's conviction of two counts of capital murder and his sentence of death. Petitioner had been represented in that court by attorney David Nickerson. Mr. Nickerson represented petitioner under appointment by the California Supreme Court.

According to Mr. Leavitt's letter, petitioner wrote to Mr. Leavitt (who also is also a member of the California bar) on July 20, 1997, asking Mr. Leavitt to represent him. Petitioner no longer wished to be represented by Mr. Nickerson, who had "adopted an approach contrary" to petitioner's express instructions. Letter at 1. Mr. Leavitt agreed to represent petitioner.

On August 7, 1997, Mr. Leavitt filed a "notice of substitution of attorney with request for appointment" of Mr. Leavitt in place of Mr, Nickerson in the California Supreme Court. According to Mr. Leavitt's letter, this request was approved by petitioner in writing. The California Supreme Court denied the request on August

21, 1997. The California Supreme Court has since declined to file pleadings submitted by Mr. Leavitt.

According to the letter, petitioner also approved Mr. Leavitt's subsequent filing of a petition for a writ of habeas corpus in the United States District Court for the Northern District of California on September 2, 1997. That petition sought to enforce petitioner's choice of Mr. Leavitt as his counsel. That petition is pending. C-97-3236-MHP.

Mr. Leavitt, whose letter further describes petitioner's objection to Mr. Nickerson's continuing representation, concludes his letter by requesting -- on petitioner's behalf -- that this Court "refuse to accept any petition for relief which Nickerson may submit to you" in petitioner's name, and Mr. Leavitt offers to provide the Court with further documentation supporting petitioner's request. Letter at 2.

Mr. Nickerson did indeed submit a petition for a writ of certiorari, postmarked December 15, 1997, along with a motion to proceed *in forma pauperis*, but did not submit an affidavit of indigence executed by petitioner. On February 23, 1998, the Court entered an order denying the motion, and the Court returned the petition to Mr. Nickerson.

Mr. Nickerson subsequently paid the filing fee and again submitted his petition to this Court. On March 10, 1998, the Court issued an order stating, in part, that the petition "was filed on December 15, 1997 and placed on the docket March 9, 1998 as No. 97-1455."

Mr. Leavitt's letter makes clear that petitioner opposes Mr. Nickerson's continuing attempt to represent him and specifically opposes Mr. Nickerson's filing of a petition for a writ of certiorari. Under these circumstances, the petition should be dismissed.

II.

DISCRETIONARY REVIEW IS NOT WARRANTED BECAUSE THE ISSUE POSED BY THE PETITION IS NOT SUPPORTED BY THE FACTS OR CIRCUMSTANCES OF THIS CASE; AND, THERE WAS NO IMPROPER POLICE CONDUCT AND THEREFORE THERE IS NO OCCASION IN THIS CASE TO CONSIDER THE PROPRIETY OF THE PROPOSED NEW RULE OF TOTAL SUPPRESSION IN THE EVENT OF POLICE MISCONDUCT

The petition contends that certiorari should be granted to address the question of whether suppression of all items of a search is an appropriate remedy when police officers act in flagrant disregard of the scope of a search warrant. *See Waller v. Georgia*, 467 U.S. 39, 43, n.3 (1984); Pet. 3-15. Respondent submits the petition should be denied because the question has no bearing on the facts or circumstances of this case. Both the trial court and the unanimous California Supreme Court concluded in the present case that "the application of that extreme remedy was not warranted."

A. Facts[3]

Detective Worthen of the Los Angeles Police Department was assigned to investigate the disappearance of Tracey Campbell, and Detective Ravens, assigned to

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3. These are the facts as found by a unanimous California Supreme Court. *People v. Bradford*, 15 Cal. 4th at 1285-89, 65 Cal. Rptr. 2d at 172-75; 939 P.2d at 286-89.

investigate the murder of one Mischa Stewart, (also believed to have been murdered by petitioner) decided to conduct their respective searches simultaneously on July 31. Detective Worthen subsequently assumed responsibility for both investigations.

Mischa Stewart, an African-American homosexual male, 23 years of age, was last seen alive near closing time on the night of October 8, 1982, departing from the Pink Elephant, a gay bar located in Santa Monica. Stewart left in the company of a man who earlier in the evening had informed the doorman that his name was "Bill" and that he was trying to sell his truck or motorhome. The following morning, Stewart's nude body was discovered in an alley across the street from the Tennessee Savings & Beer Co., a bar frequented by petitioner. A woman's bra, used as a ligature to strangle Stewart, was wrapped around his neck, and a pair of women's panties bearing the logo, "Genuine Harley Ass," covered his face. Semen was discovered on his upper leg. The doorman at the Pink Elephant subsequently identified petitioner from a photographic lineup as the man who left with Stewart.

On July 31, 1984, Detective Worthen prepared an affidavit of probable cause in support of a warrant to search petitioner's person, apartment and vehicle. The affidavit did not refer to Jane Doe No. 60, who had not yet been identified as Shari Miller nor connected to petitioner, but did refer to Tracey Campbell as well as Mischa Stewart. The affidavit included extensive information as to the circumstances surrounding the disappearance of Campbell and the death of Stewart, describing petitioner's connection to both cases, including the circumstance that he appeared to be the last person to have been seen with each victim. The affidavit also

described an incident in the desert involving Julianne P. for which charges then were pending against petitioner.[4]

The affidavit in support of the July 31, 1984 search warrant explained petitioner's considerable involvement in photography and stated that it appeared, as part of petitioner's modus operandi, that he "takes photographs [of] or films his victims." The affidavit referred to numerous attachments, including the following: the police reports of the investigations in the Campbell and Stewart cases; the police and medical reports of the Julianne P. incident, noting that she had been threatened with a knife and icepick, "forced to submit to various sexual atrocities," and that "part of these acts were filmed by the suspect;" a report of a police interview with Tracey's cousin Todd Heidrick, noting that petitioner had photographed him prior to engaging in sexual activity with him;[5] and petitioner's three-page "rap sheet" indicating other incidents of sexual or violent assaults.

The July 31, 1984 search warrant authorized the seizure from petitioner's person of samples of blood, semen, saliva, and head and pubic hair. With regard to Tracey Campbell, the warrant authorized the search and seizure of any blood, head and pubic hair, and particular items of clothing and jewelry and, with regard to Mischa Stewart, a particular jacket. The warrant also authorized the seizure of "any and all photographs and negatives," camera equipment, sexual devices, items of "underclothing" such as bras, panties, novelty items, and negligees, petitioner's bank books, credit cards, gasoline

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4. This rape of Julianne P. was documented during the penalty phase. *People v. Bradford*, 15 Cal. 4th at 1277-79, 65 Cal. Rptr. at 168-69, 939 P.2d at 282-83.

5. That detail of petitioner's relationship with Heidrick was excluded from the evidence presented at trial.

purchase receipts, mail order catalogs, and "receipts for such items purchased."

Pursuant to the warrant, the police seized among other items 189 photographs (including those of Shari Miller), a knife and a rifle.

Petitioner, asserting that the July 31, 1984 warrant was overbroad and not supported by probable cause and that the search itself was general and exploratory, moved to quash and traverse the warrant and to suppress numerous items seized. Following argument by counsel, the trial court ruled that the warrant was overbroad to the extent it permitted the seizure of "any and all photographs" and deemed the warrant amended so that, in effect, the references to any and all photographs were limited to those "pertaining to" Campbell or Stewart or to certain lingerie.

The prosecution then urged that, despite the warrant's overbreadth, it was unnecessary to suppress any of the evidence seized, because the "good faith" exception to the rule requiring suppression of evidence seized pursuant to an invalid warrant was applicable, and that any evidence seized beyond the proper scope of the warrant was admissible pursuant to the "nexus rule." To determine whether the good faith exception and nexus rule applied, and whether a general, exploratory search had been conducted, the trial court ordered an evidentiary hearing.

At the hearing, Detective Worthen testified that he provided Detectives Ravens and Rooney with copies of the search warrant and explained the contents of the warrant and affidavit to these detectives, as well as to Detective Rockwood and other officers. The officers discussed the warrant over the course of several days, and Detective Worthen held a meeting on the morning of the search. Detective Worthen instructed the officers to search for photographs of Stewart, Campbell, and other males and females, particularly young females (due to his

suspicion that items of Campbell's clothing might be worn by other subjects in certain of the photographs), and for photographs depicting desert scenes. Detective Worthen told the officer to search for anything having evidentiary value, including the items specified in the warrant and the attachments to the affidavit, such as an icepick, knife, or rifle.

Detective Worthen testified that he had given these instructions based in part upon information he had received concerning petitioner's previous criminal activities. Detective Worthen had been informed by the Los Angeles County District Attorney's office of the incident that had occurred several weeks prior to the disappearance of Tracey, in which petitioner had taken Mark W. and Tamara H. out to the desert. Detective Worthen had learned, and informed the investigating officers, that petitioner had threatened Mark W. with a rifle, may have forced Tamara H. to perform oral copulation, and had taken photographs of one or both victims.

Detective Worthen also relied upon information he had concerning the circumstances of the alleged attack on Julianne P. Although the police previously had searched petitioner's motorhome in connection with that case, Detective Worthen believed additional items might be located in petitioner's apartment.

Detective Worthen also had learned from petitioner's former wife, Cindy, that many years previously, petitioner sometimes had awakened screaming due to "nightmares of a girl that he murdered and buried," and that petitioner once had threatened Cindy with a rifle. A number of interviewees had informed Detective Worthen that for a period of several years, petitioner had photographed various young women and girls, often having them dress in outfits selected by petitioner. Detective Worthen learned of at least one other unreported possible criminal incident occurring in 1972 or

1974, in which petitioner purportedly had driven a female 15 years of age to Malibu Canyon, where he attempted to give her narcotics and take her photograph. Based upon his review of petitioner's criminal history and his knowledge of the facts of the present cases, Detective Worthen suspected that petitioner might be responsible for the deaths of persons in addition to Stewart and Campbell.

Detective Worthen testified that he also relied upon petitioner's "rap sheet." Petitioner's prior record included a 1972 charge of assault with intent to commit rape, reduced to battery pursuant to petitioner's guilty plea, several charges of indecent exposure in 1971 that had been dismissed, and several earlier charges of automobile theft.

Detective Worthen testified that he believed he had probable cause to seize each of the photographs on the basis of the warrant and affidavit. Detective Worthen had informed the police officers assigned to search the apartment that they were not limited to the items described in the warrant, but were to seize any item that might have relevance to anything mentioned in the affidavit. Detective Worthen did not recall whether he had a photograph of Campbell or Stewart with him at the time he and the officers executed the search warrant.

Detective Ravens, who was in charge of the search of petitioner's apartment, testified that prior to the search, he had read the affidavit of probable cause but not its numerous attachments. He believed that the police were to seize an item not listed in the warrant if, once the police were inside the apartment, there appeared evidence related to other possible murder victims that might be used in future investigations.

The police seized many of the contents of the hall closet in petitioner's apartment. Detective Ravens seized a .22 caliber rifle not described in the warrant, because it was common police practice to seize all

firearms in a homicide case. Pursuant to the July 31, 1984, warrant's direction to seize all photographs, Detective Ravens seized a photo album in the belief that photographs might be relevant to another criminal investigation. Detective Ravens had not been informed specifically what jewelry Tracey was wearing when she disappeared, and therefore seized numerous pieces of jewelry that he believed might belong to her.

After 6 p.m. on July 31, Detective Rooney conducted a search of petitioner's automobile. The detective had investigated the death of Mischa Stewart, had seen his photograph and observed his body at the murder scene, and also had received a photograph and description of Tracey. Rooney previously had examined and had with him a copy of the search warrant, but did not recall reading the affidavit.

The trial court denied the defense motion to suppress evidence as to the July 31, 1984 search. The court ruled that the police officers had not conducted an exploratory search, but rather had seized items described in the warrant or closely resembling such items, or that were so interconnected with specifically described items that it would be impossible or impracticable to separate the items prior to their seizure.

The court subsequently granted the motion in part, suppressing the rifle seized from defendant's apartment, but declining to suppress the several photographs depicting Shari Miller or the knife. The trial court determined that despite the warrant's overbreadth, the photographs seized from defendant's vehicle were admissible because the officers executed the search in a "good faith" belief the warrant was valid, and because police testimony concerning the connection between the woman in the photographs and Jane Doe No. 60 had establishes a nexus between those photographs and the items whose seizure was authorized by the warrant. The court found that a nexus was established between the

knife and "two acts of criminal behavior where a knife had been used."

On August 16, 1984, the same Los Angeles police officers conducted a second search pursuant to a warrant. This second warrant authorized the officers to search: the apartment of Petitioner and his roommate, Olga Talbot, "any and all facilities within the structure, garages or storage units, all basements, attic areas and all containers located either inside the described premises or on the grounds of the premises designated for their use," three automobiles, including an automobile rented by Olga Talbot; and a storage locker at another location rented by Talbot.

Following a hearing on the August 16, 1984 search the trial court determined that the search exceeded the scope authorized by the warrant and encompassed the search of a vehicle and several storage lockers not named in the warrant. Accordingly, it ruled that evidence seized during the unauthorized portions of the search could not be introduced at trial and ordered suppressed numerous items, including a belt buckle with a motorcycle logo that the prosecution had sought to admit at trial. The trial court rejected, however, defendant's motion to suppress all evidence seized during the search, including that lawfully seized -- a motion premised upon the theory that the conduct of the police was in "flagrant disregard" of the authorized scope of the search and must be punished by a total suppression of evidence. Although remarking that "portions of the search did possess exploratory qualities, and that the seizure of numerous items of property was overly broad," the trial court found that "the officers had not acted in bad faith," and that "the majority of the items seized" were seized lawfully. The court concluded that the conduct of the search did not rise to the level of the egregious misconduct which justifies the imposition of the ultimate sanction of total suppression of items seized during the course of this search.

B. Discussion

At the outset, respondent points out that petitioner has never specified which items of evidence from the searches of July 31, 1984, and August 16, 1984, were improperly and prejudicially admitted against him at trial. Instead, he simply objects to the searches as a general matter. Stated another way, petitioner points to no particular item of evidence yielded in either search as either (a) wrongly admitted at trial or, more importantly, (b) significant in the outcome of this case, i.e., prejudicial. *Chapman v. California*, 386 U.S. 18 (1967). These failures illustrate that the question presented by petitioner is academic.

The petition also relies on the misleading suggestion that there has been a judicial finding that an exploratory search *ever* took place in this case. Such an assertion was specifically rejected, as to both searches. As to the July 31, 1984 search, the California Supreme Court concluded that in view of the information possessed by the supervising police officers, the contents of the affidavits of probable cause and the information contained in the attachments, petitioner could not establish that the July 31, 1984 search was exploratory. App. 54.

As to the August 16, 1984 search, examination of the record shows that, although the court remarked that "portions of the search did posses exploratory qualities" (RT 7704), the court specifically found that "the majority of the items seized" were seized lawfully. RT 7707. Thus, that court concluded

> whether criticism may be directed toward the conduct of this particular search it does not appear to rise to the level of egregious misconduct which justifies the imposition of the ultimate sanction of total suppression of items seized during the course of this search.

RT 7708. In fact, the court expressly found that "the officers had not acted in bad faith." RT 7706.

The California Supreme Court was more emphatic when rejecting the remedy of total suppression as to the August 1984 search:

> Assuming that the remedy of total suppression is required when police conduct is in flagrant disregard of the limits of the warrant, we conclude that in the present case the trial court properly found that the application of that extreme remedy was not warranted and suppressed only items not covered by the warrant. Although the record indicates that the officers searched a vehicle and several storage locker areas that were not clearly named in the warrant, it also establishes that defendant had no reasonable expectation of privacy with regard to the vehicle and certain of the locker areas. It is also apparent that other locker areas in which he had such a reasonable expectation of privacy were within close proximity to the vehicles as well as to the lockers identified at the scene as being used by the inhabitants of defendant's residence.
>
> Although the officers seized a number of items that clearly fell outside the scope of the warrant, the record reveals that the bulk of these items might have had some bearing upon the current offenses. [Citation omitted.] The several remarks by police witnesses indicative of a broader purpose do not establish a flagrant disregard of the limits of the warrant when considered in the context of the total testimony. The officers may have entertained the hope that evidence pertaining to unrelated crimes also would be discovered, but it is very apparent that the search was not simply a pretext for a general

> search for evidence of unrelated crimes. The record does not demonstrate that the officers had not been briefed or prepared as to the objects of the search [citation omitted], or that their search amounted to a "fishing expedition." [Citation omitted.] Nor was the behavior of the officers so unconscionable as to amount to a due process violation. [Citation omitted.] Under these circumstances, the trial court did not err in declining to order the "extraordinary remedy" of total suppression of all items seized.

People v. Bradford, 15 Cal. 4th at 1306-07, 65 Cal. Rptr. 2d at 186-87; 939 P.2d at 300-01; App. 69-70, italics added.

The foregoing illustrates that the question posed by petitioner has no basis in the facts of this case. The petition for writ of certiorari should therefore be denied.

CONCLUSION

The petition presents no issue worthy of discretionary review by this Court. The petition for writ of certiorari therefore should be denied.

Dated: April 8, 1998.

Respectfully submitted,

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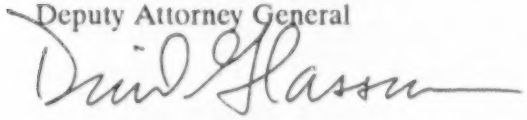

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